



Attorney Docket No. SHP-02003/03

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

le-19-03
#12

Applicant: Shirley Pollack

Serial No.: 09/939,993

Group Art Unit: 3742

Filing Date: August 27, 2001

Examiner: John A. Jeffery

Title: FORCED AIR DRYER FOR INFANT'S BOTTOM

APPELLANT'S REPLY BRIEF

Mail Stop AF
Commissioner for Patents
PO Box 1450
Alexandria, VA 22313-1450

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Dear Sir:

Appellant submits the following arguments under 37 CFR §1.193 in response to new points of argument raised in the Examiner's Answer.

Initially, it is noted that an Examiner's Answer must not include a new ground of rejection unless Appellant has proposed an after-final amendment followed by an Advisory Action indicating that it would be entered for the purposes of appeal. 37 CFR §1.193(a)(2). No after-final amendment was proposed or filed in this case. Although, technically, the Examiner's Answer does not include a new *ground* of rejection, the Board will note that the Answer so many new *arguments* that it may be in violation of 37 CFR §1.193(a)(2).

On page 4, and continuing on to page 5 of the Examiner's Answer, a new argument is raised that since "person's body" or a "baby" are recited only in the preambles of Appellant's claims, that such terms should be disregarded as merely setting forth intended use. However, referring to claim 1 (under which all of the claims on appeal stand or fall), "a person's body" and "the person," are both brought down into the body of the claim, thereby breathing some life into the claim, at least to the fullest extent possible in view of the restriction that body parts cannot be positively recited. Accordingly, with particular regard to the outstanding obviousness rejection, such language, ostensibly written in means-plus-function style, should be taken into account.

GIFFORD, KRASS, GROH, SPRINKLE, ANDERSON & CITKOWSKI, P.C. 280 N. OLD WOODWARD AVENUE, STE. 400, BIRMINGHAM, MICHIGAN 48009-5394 (248) 647-6300

Noted
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The Examiner advances various new arguments regarding the interpretation of certain terms from the prior art, in a way that Appellant has never had the opportunity to address. In particular, beginning toward the bottom of page 6, the Examiner now states that “hand torch” from DE ‘484, should be interpreted as “flashlight,” as opposed to a “torch” that could burn a person with fire. Appellant has never had the opportunity to consider this new interpretation. *Even so*, the fact that the Examiner now wants “torch” to be interpreted as a “flashlight,” it is still clear that the device in question would burn a human being, is non-analogous art, and would be rendered unfit for its intended purpose through the Examiner’s proposed combination. Accordingly, the Examiner has still failed to establish *prima facie* obviousness. The interpretation of “as hot as fire” in DE ‘484 is mere speculation and not repugnant to the reference. It must be kept in mind that the device set forth in the reference is intended to melt ice and cause a lock to become unfrozen, presumably on a timely basis. Holding such a device close to a human being would be ill-advised if not dangerous.

On page 9 of the Examiner’s Answer, the Examiner sets forth voluminous new arguments regarding Ohm’s Law, and the degree to which power can be generated using batteries. The Examiner concludes that “the ice-melting air flow issuing from the small, flashlight-like device of DE ‘484 is capable of drying a moist region of the body, as well as a baby.” Why didn’t the Examiner present these mathematical arguments in previous rejections, rather than holding back with scientific “proof” that the reference is “capable” of drying the skin of a baby? Such new-found arguments notwithstanding, the point is moot, since Appellant’s argument is not that the “torch” of DE ‘484 is incapable of drying a person, but that it teaches away from such purpose by getting too hot, such that the teachings are relegated to a different field of endeavor. The Examiner’s argument is tantamount to saying that a true blow-torch or welding torch could dry the skin of a baby. If that is the Examiner’s argument, Appellant agrees. The problem is that the skin would also be burned, as well as dried. At the bottom of page 10 and the top of page 11 of the Examiner’s Answer, more conclusions are drawn regarding the extent to which heat could be generated with batteries, using a “flashlight”-like air heater. These are all newly presented arguments in violation of 37 CFR §1.193(a)(2).

With regard to the combination of DE ‘484 and Caruso, the Examiner contends that “there is ample motivation to combine.” Nothing could be further from the truth, since such motivation must come from the prior art, and not the Examiner’s opinion. The Examiner contents that “because DE

'484 has a single outlet nozzle that aspirates the entire heated airflow stream towards the workpiece, the DE '484 heater is equally subject to output blockage and concomitant back pressure problems. Where is this new argument coming from? The only answer is that the Examiner has now "analyzed" the apparatus of DE '484 in detail, and comes to the personal observation and conclusion that it could benefit from the teachings of Caruso. But again, this is not the standard since neither DE '484 nor Caruso teach or suggest the combination.

Based upon the foregoing, the Examiner's Answer and new-found grounds for argument notwithstanding, Appellant's seeks the Board's concurrence that the pending claims of this application continue to be in condition for allowance.

Dated: June 9, 2003

Respectfully submitted,

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